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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

JUN 6 1994

Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Chairman Hundt:

On June 9, the Federal Communications Commission is scheduled to reconsider its rules concerning the provision of personal communication services (PCS) and specify the rules for auctioning spectrum in the 2 GHz band. This represents a significant step in the wireless telecommunications revolution. Congress recognized the importance of wireless communication and required the Commission to adopt rules that would permit designated entities (small businesses, women and minority-owned businesses, and rural telephone companies) to participate in this revolution. I believe that there are three important steps the Commission must take to ensure that small businesses can successfully compete in the PCS marketplace. The Commission must adopt an appropriate definition of small business, utilize spectrum set-asides for designated entities, and establish reasonably-sized licensing areas.

I. SMALL BUSINESS DEFINITION

First, the Commission must arrive at an adequate definition of small business. As you know, the auction legislation requires the Commission to provide special assistance to small business (and other designated entities) in the purchase of spectrum. If the parameters are too low, small businesses will not have sufficient financial strength to purchase spectrum, construct a system, and compete in the marketplace. On the other hand, an overly broad definition, such as one based on net worth alone, may permit entities that require no assistance at all to qualify for whatever special provisions the Commission decides to adopt for PCS.

I believe that an appropriate solution is to utilize revenue to determine whether an enterprise qualifies as a small business. In previous comments, the Office of Advocacy suggested that 40 million dollars was an appropriate standard. I reiterate my support for that standard and urge the Commission to seek the approval of the Administrator for that definition as required by 15 U.S.C. § 632.

As a corollary to the definition of a small business, the

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Commission must consider at what point various investments of large entities should be attributable to the small business and, thus, deny it status as a designated entity. I recommend that as long as the small business retains operational control of the business, it should qualify as a designated entity.

My only caveat to this general rule is that investment by certain communications companies should be attributable to those companies and remove the small business from the designated entity classification.¹ I believe this is necessary to foster competition and avoid the possibility that large telecommunications firms will utilize designated entities as fronts to obtain more spectrum.

Finally, I realize that small entities may form consortia in order to bid on spectrum and construct PCS systems. I continue to support the view taken in our comments that a consortium consisting solely of designated entities should be treated as a designated entity even if the consortium exceeds the revenue standard delineating small business.

II. SPECIAL ASSISTANCE

The primary significance of adopting definitions of designated entities is to enable them to qualify for special assistance under the auction legislation. As you know, that legislation does not mandate the use of any specific assistance mechanism. It simply provides a non-exhaustive list of tools that would help designated entities compete in the auctions.

I believe that of all the mechanisms listed in the statute or alluded to by the Commission in various rulemakings, only a spectrum set-aside will provide designated entities with any real assistance in a market as valuable as PCS. Designated entities, particularly small businesses, do not have the financial resources to effectively bid against the giants of the telecommunications industry for spectrum. Bid credits will be of little solace to the small business that can not obtain the funds needed to meet even a reduced bid arising from a bid credit. Small businesses simply are not on an level playing field with the RBOCs, McCaw Cellular, or AT&T. The only way for them to succeed is to face equal competition, i.e., other small businesses in an auction set-aside specifically for designated entities.

Some concern has been raised about the constitutionality of a

¹ This proviso should apply to any cellular carrier with more than 100 million dollars in revenue, local exchange carriers subject to price cap regulation, the top 15 multiple system cable operators, and the five largest interexchange carriers.

spectrum set-aside for designated entities. In my estimation, that fear is misplaced. The Supreme Court's decision in *City of Richmond v. J.A. Croson*² did not forbid the use of set-asides and the Court went out of its way to specifically reaffirm *Fullilove v. Klutznick*³ which held that Congressionally-mandated set-asides were constitutional. In addition, the Small Business Administration's timber set-aside program for purchasers of national forest timber has been upheld in court.⁴ Sufficient legal precedent exists that supports the constitutionality and legality of a spectrum set-aside for designated entities.

III. SIZE OF LICENSING AREA

The final requirement for small business to effectively compete in the PCS market are appropriate-sized licensing areas. I concur in the Commission's goal to foster competition in the current duopoly market for cellular service and that larger licensing areas for PCS may increase competition. However, that laudable goal must be weighed against the potential difficulties that small businesses face if they are to compete in the wireless market. Small businesses do not have the access to capital resources necessary to construct PCS systems in major trading areas (MTAs) but may have the resources to provide service in basic trading areas (BTAs). If an MTA/BTA dichotomy is maintained, small businesses (with the rare exception) will be relegated to providing service in a BTA. Given a choice between purchasing service from a provider in a MTA or BTA, I suspect that most consumers will select the MTA provider. Small businesses will be forced to battle over non-viable BTA service territories. Ultimately, only the MTA providers will survive.

I strongly urge the Commission to avoid relegating small businesses to second-class status from the start. This can be averted by establishing equal-sized sensible trading areas for all prospective participants in PCS. Given the Commission's insistence on using Rand-McNally definitions, I urge the Commission to adopt the BTA as the sole licensing area for PCS. Should users of PCS desire larger areas, consolidation will be dictated by the marketplace not by agency fiat.

² 488 U.S. 469 (1989).

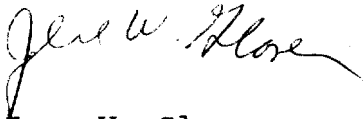
³ 448 U.S. 448 (1980).

⁴ *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 366 (D.D.C. 1974), *aff'd per curiam*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

IV. CONCLUSION

The Commission's decision on PCS is most difficult. Congress required the Commission to balance a number of competing interests. I believe that the recommendations outlined above will help the Commission arrive at an optimal treatment of the diverse interests represented in the PCS marketplace.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jere W. Glover".

Jere W. Glover
Chief Counsel for Advocacy

cc: Honorable Andrew Barrett, Commissioner
Honorable Rachelle Chong, Commissioner
Honorable Susan Ness, Commissioner
Honorable James Quello, Commissioner